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No. 90-353

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In The

Supreme Court of the United States

October Term, 1990

LAMPF, PLEVA, LIPKIND, PRUPIS & PETIGROW,

Petitioner,

v.

JOHN GILBERTSON, JOHN V. REITZ and ANTHONY E. CATALAN, *et al.*,

Respondents.

On Writ Of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

1. Should the statute of limitations for private actions under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5, promulgated thereunder, 17 C.F.R. § 240.10b-5, be determined by state common law fraud statutes of limitations which are discovery-based and do not have unduly short statutes of repose or by a federal statute such as the Interstate Land Sales Full Disclosure Act, the Insider Trading Act or one of the various express remedies in the Securities Act of 1933 or the Securities Exchange Act of 1934?

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No. 90-333

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Respondents.

On Writ Of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

BRIEF FOR RESPONDENTS

STATUTES

This case involves the statutes, regulations, and rules set forth by Petitioner and the following additional statutes which are set forth verbatim in the Appendix to this Brief.

1. Sections 1404(a), 1410(a)-(b), and 1412(a) of the Interstate Land Sales Full Disclosure Act, 15 U.S.C. §§ 1703(a), 1709(a)-(b), 1711(a).

2. Section 313 of the Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5115.

STATEMENT OF THE CASE

Respondents correct and supplement Petitioner's statement in certain respects.

The sole issue decided by the trial court on summary judgment was whether plaintiffs were on inquiry notice of fraud more than two years before commencing their § 10(b) claims and more than four years before commencing their RICO claims.[1] This issue involved applying federal law to the facts of the case. While the applicable statute of limitations for the § 10(b) claims was determined by state law, when the statute of limitations began to run was a question of federal law. *See* Pet.'s Cert. Br. at 12A-13A.

For purposes of summary judgment, the parties and the trial court accepted plaintiffs' allegations as true. Plaintiffs alleged that the offering memoranda represented the limited partnerships would own valuable computer hardware and software. JA 17-18. In fact, several of the partnerships never owned any hardware. JA 68, 85, 102, 220. Other partnerships owned hardware that was knowingly overvalued, and all of the software was knowingly overvalued.[2] Petitioner and the other defendants knowingly or recklessly participated in the fraud. *See e.g.*, JA 41 (*Reitz* Fourth Amended Complaint, ¶¶ 54 and 55). Contrary to Petitioner's statement, there is no evidence that Petitioner merely prepared a model offering

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[1] This case involves the consolidated actions of *John V. Reitz, et al. v. Leasing Consultants, et al.*, Ninth Circuit Case No. 88-4077, *John Gilbertson, et al. v. Anders G. Arnheim, et al.*, Ninth Circuit Case No. 88-4100, and *Anthony E. Catalan v. Paulson Investment Company, Inc., et al.*, Ninth Circuit Case No. 88-4099, which will herein be referred to as "*Reitz*", "*Gilbertson*" and "*Catalan*".

[2] There are seven separate limited partnerships. For examples of allegations of overvaluation common to each limited partnership, *see* JA 28, 29, 31-32, 33, 36, 37 and 38 (*Reitz* Fourth Amended Complaint, ¶¶ 34(b), (c), (e) and (f), 38(g) and (h), 39(b) and (c), and 40(a) and (c), relating to the Duval Limited Partnership).

memorandum. In six of the seven limited partnerships, Petitioner prepared the offering memoranda in question, was general or tax counsel, wrote tax opinions which contained key misrepresentations and which were used in the offering memoranda, and wrote model partnership and lease agreements. Lampf further assisted in concealing the fraud. JA 33-39, 40, 49-56, 65-70, 72-73, 82-89, 98-104, 106, 115-120, 122.

Plaintiffs are residents of Oregon, California and Washington. Defendants knew the investments would be sold in Oregon. They did not argue in the lower courts that the applicable statute of limitations for the § 10(b) claims should be found elsewhere than in Oregon common law fraud, unless the court was going to overrule prior case law and apply a federal statute of limitations.

The "periodic written reports" (the Lawrence Reports) were written to allay any suspicion of fraud. JA 39, 54-55, 71, 88-89, 105, 121 and 223. The promoters, who had knowingly created the fraudulent investments, installed a purported expert in computer matters to write the reports to give an explanation for the lack of financial success of the investments. *Id.* In the case of one partnership, they also restructured the investment to purchase real estate to replace the software. JA 71-72. In the case of the other partnerships, they installed one of their cohorts (unbeknownst to plaintiffs) as the general partner or administrative assistant. This further allayed any suspicion of fraud. As the Ninth Circuit explained:

> . . . Appellants' knowledge that the software investment had performed dramatically below projections did not necessarily suggest intentional misrepresentation of income projections, upon which the software appraisals were based, at offering time. Rather, the software failures could have resulted from realization of the risks of technological obsolescence, market change, and lessee marketing difficulties – of which the offering memoranda had warned and to which the Lawrence Reports (except possibly those sent to the Euston Associates investors) had ascribed the failures.

Pet.'s Cert. Br. at 14A.

Plaintiffs did not discover the fraudulent nature of the investments until an attorney hired by one of the general partners to defend Internal Revenue Service audits discovered there simply was no hardware for some of the partnerships. JA 40, 55, 72, 89, 106, 122 and 224.

This case should be affirmed and remanded if this Court continues to apply the Oregon common law fraud statute of limitations or a similar statute of limitations that does not have a three year statute of repose. Also, the case should be remanded if a new statute of limitations that bars plaintiffs' claims on its face is not applied retroactively or if the doctrines of fraudulent concealment or equitable tolling apply.

SUMMARY OF ARGUMENT

The issue before this Court is whether the statute of limitations for § 10(b) of the Securities Exchange Act, 15 U.S.C. § 78j(b), and Rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5, (referred to collectively as "§ 10(b)") should be drawn from state or federal law. Applying the traditional rule of borrowing state law where no express statute of limitations exists for a federal cause of action, courts have, until recently, uniformly looked to analogous state law.[3] The exceptions to the traditional rule do

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[3] Prior to *In re Data Access Sys. Sec. Litig.*, 843 F.2d 1537 (3d Cir.) (*en banc*), *cert. denied*, 488 U.S. 849 (1988), all twelve circuits borrowed the forum state's statutes of limitations. *See, e.g., Corwin v. Marney, Orton Inv.*, 843 F.2d 194 (5th Cir.), *cert. denied*, 488 U.S. 924 (1988); *Suslick v. Rothschild Sec. Corp.*, 741 F.2d 1000 (7th Cir. 1984); *Vucinich v. Paine, Webber, Jackson & Curtis, Inc.*, 739 F.2d 1434 (9th Cir. 1984); *Kennedy v. Tallant*, 710 F.2d 711 (11th Cir. 1983); *Armstrong v. McAlpin*, 699 F.2d 79 (2d Cir. 1983); *Herm v. Stafford*, 663 F.2d 669 (6th Cir. 1981); *Sharp v. Coopers & Lybrand*, 649 F.2d 175 (3d Cir. 1981), *cert. denied*, 455 U.S. 938 (1982); *Buder v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 644 F.2d 690 (8th Cir. 1981); *O'Hara v. Kovens*, 625 F.2d

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not apply here. State common law fraud law remains the most analogous body of law. It has a discovery-based statute of limitations and does not have a short three year statute of repose. It best accommodates the policies furthered by § 10(b) and the practicalities of § 10(b) fraud litigation.

Petitioner argues that this Court should apply the one year from discovery/three year from sale ("one year/three year") limitation and repose period of the express, private remedies provided in the Securities Act of 1933 and the Securities Exchange Act of 1934 (referred to collectively as the "Acts"). The substance of Petitioner's argument is that had the 73rd Congress enacted an express right of action for § 10(b), it would have applied a one year/three year limitation period as it had done for the express private remedies.

Neither Congress nor the Commission ever considered the possibility of there existing a private right of action under § 10(b) and Rule 10b-5. *See Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 730, 737 (1975) (emphasizing there is no legislative intent concerning private actions under Rule 10b-5, as it is a "judicial oak which has grown from little more than a legislative acorn"). Where no limitations period is expressly provided for in a federal cause of action, this

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15 (4th Cir. 1980), *cert. denied*, 449 U.S. 1124 (1981); *Wachovia Bank & Trust Co. v. Nat'l Student Mktg. Corp.*, 650 F.2d 342 (D.C. Cir. 1980), *cert. denied*, 452 U.S. 954 (1981); *Cook v. Avien, Inc.*, 573 F.2d 685 (1st Cir. 1978); *de Haas v. Empire Petro. Co.*, 435 F.2d 1223 (10th Cir. 1970).

Even after *Data Access*, most courts that have considered *Data Access* have declined to abandon the traditional rule of borrowing state law. *E.g., Bath v. Bushkin, Gaims, Gaines & Jonas*, 913 F.2d 817 (10th Cir. 1990); *Nesbit v. McNeil*, 896 F.2d 380 (9th Cir. 1990); *Smith v. Duff & Phelps, Inc.*, 891 F.2d 1567 (11th Cir. 1990); *Roney & Co. v. Goren*, 875 F.2d 1218 (6th Cir. 1989); *Mercer v. Jaffe, Snider, Raitt & Hever, P.C.*, 713 F.Supp. 1019 (W.D. Mich. 1989); *Corwin v. Marney, supra; Durham v. Business Management Assocs.*, 847 F.2d 1505 (11th Cir. 1988); *Ebrahimi v. E.F. Hutton & Co., Inc.*, 852 F.2d 516 (10th Cir. 1988); *TCF Banking & Savings, F.A. v. Arthur Young & Co.*, 697 F.Supp. 362 (D. Minn. 1988).

Court has consistently applied the analysis outlined in *DelCostello v. International Bd. of Teamsters*, 462 U.S. 151 (1983). Under this analysis, "analogous state statutes of limitations are to be used unless they frustrate or significantly interfere with federal policies" and the practicalities of litigation, *Reed v. United Transport. Union*, 488 U.S. 319, 327 (1989), *and* "federal law clearly provides a closer analogy" than state law, *DelCostello*, 462 U.S. at 172. Congress intends by its silence that courts should apply state law. *Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143, 147 (1987). Legislative intent may be relevant to the federal policies at stake but not to guess what Congress might have provided in a statute of limitations, particularly where legislative intent is of little assistance even in "divining" the contours of a § 10(b) cause of action. *Blue Chip Stamps*, 421 U.S. at 737.

The fundamental purpose behind the federal securities laws is to protect the investor by: (1) insuring full disclosure and (2) preventing fraud. *See Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 195 (1976). In the express remedies, Congress eliminated or relaxed the requirements of proving scienter, reliance, and causation and shifted the burden of proof to defendants to assure full disclosure and protect investors. Scrutiny of the national exchanges by the public, the media and the SEC and the lack of a scienter requirement ensure that violations of the express remedies do not go long unnoticed. In light of the relatively light burden placed upon a plaintiff and the relative ease of early detection of wrongdoing, the one year/three year limitations period is suited for the express remedies.

In contrast, a § 10(b) action is a fraud based claim. It not only requires proof of misstatement, nondisclosure or manipulation, but also proof of scienter, reliance and causation. *Ernst & Ernst*, 425 U.S. at 193. The elements of a common law fraud claim are substantially similar to the elements of a § 10(b) claim. Thus, common law fraud is sufficiently analogous for statute of limitations purposes. This Court has interpreted § 10(b) in view of the differences between § 10(b) and the express remedies, including the different statute of limitations periods. *Id.* at 210, n.29; *Herman & MacLean v. Huddleston*, 459 U.S. 375, 384 n.18 (1983).

The relatively longer, discovery-based limitation periods for common law fraud and the absence of a short repose period further

the remedial purposes of the Acts and the policy of encouraging private litigation of the federal securities laws. It accommodates the practicalities of § 10(b) litigation where fraud, in many instances, simply cannot be discovered in three years. Applying the approach used in *Wilson v. Garcia*, 471 U.S. 261 (1985), characterizing all § 10(b) claims as actions for fraud sufficiently accommodates interests in uniformity and certainty.

The express remedies, on the other hand, are not as analogous to § 10(b) as is common law fraud. The three year period of repose would frustrate the policies furthered by § 10(b) and ignore the practicalities of litigation. Section 10(b) has become a catchall provision for all types of fraud to which the express remedies do not apply, such as churning and suitability claims against brokers, market manipulation, fraud involving limited partnerships, fraud in national markets and liability on the part of aiders and abettors. A three year period of repose would foreclose many claims even before an investor should have reasonably discovered fraud. It would remove the key federal remedy in all cases where fraud goes undetected for three years. For example, in Ponzi schemes, cases with a series of fraudulent audited financial statements, bond cases, and limited partnerships, an investor can be easily led to believe for more than three years that the investment is not fraudulent. A three year period of repose would simply prevent many plaintiffs from obtaining any relief under the federal securities laws. It would undermine the remedial purpose of the Acts and the policy of encouraging private litigation. It would institute a policy of *caveat emptor* that is inconsistent with the policies of the securities laws. Moreover, where promoters and their assistants are able to hide fraud for more than three years, plaintiffs will be forced to find relief under state law and will file their claims in a multitude of state and federal courts.

Petitioner's argument is weakened by Congress' acquiescence, for the past 45 years, in the borrowing of state law for § 10(b) claims and Congress' most recent treatment of fraud. In § 20A of the Insider Trading & Securities Fraud Enforcement Act of 1988 ("Insider Trading Act"), 15 U.S.C. § 78t-1, Congress provided a limitations period of five years from the date of the last transaction, 15 U.S.C. § 78t-1(b)(4), for insider trading, a particular type of Rule 10b-5 violation. In the Interstate Land Sales Full Disclosure

Act ("Interstate Land Sales Act"), 15 U.S.C. § 1701 *et seq.*, Congress provided a private cause of action virtually identical to Rule 10b-5 and for the same remedial purpose of combatting fraud. Unlike the one year/three year limitations period of the express actions, the Interstate Land Sales Act allows actions for fraud to be brought within three years from discovery and is not subject to a short period of repose. 15 U.S.C. § 1711(a)(2).

Should this Court decide to abandon the traditional borrowing rule and look to federal law, the limitation periods provided in the Interstate Land Sales Act and § 20A of the Insider Trading Act are more suitable to § 10(b) actions than the three year period of repose of the express remedies. Further, the Court may wish to consider § 313 of the recently enacted Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5115. While prospective only, it also provides an alternative solution. It provides for a uniform statute of limitations of four years from accrual for all causes of action not subject to an express limitations period.

Finally, if a new limitations period is adopted, it should be subject to the doctrines of equitable tolling and fraudulent concealment, and should not be applied retroactively.

ARGUMENT

I. THE TRADITIONAL RULE IS TO BORROW STATE STATUTES OF LIMITATIONS *UNLESS* FEDERAL LAW IS CLEARLY MORE ANALOGOUS, AND THE APPLICATION OF STATE LAW CONFLICTS WITH FEDERAL POLICIES AND PRACTICALITIES OF LITIGATION.

Section 10(b) does not expressly provide for a private cause of action and, consequently, has no express statute of limitations. In such instances, the traditional rule is to apply the most analogous statute of limitations of the forum state. "As early as 1830, this Court held that state statutes of limitations govern the timeliness of federal causes of action

unless Congress has specifically provided otherwise." *Auto Workers v. Hoosier Cardinal Corp.*, 383 U.S. 696, 703-4 (1966).[4] In *Reed*, this Court recently reiterated that it "generally conclude[s] that Congress intended that the courts apply the most closely analogous statute of limitations under state law." 488 U.S. at 323 (quoting *DelCostello*, 462 U.S. at 158). "Given our longstanding practice of borrowing state law, and the congressional awareness of this practice, we can generally assume that Congress intends by its silence that we borrow state law."[5] *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 147 (1987).

In rare instances, "state statutes of limitations can be unsatisfactory vehicles for the enforcement of federal law. In those instances, it may be inappropriate to conclude that Congress would choose to adopt state rules at odds with the purpose or operation of federal substantive law." *DelCostello*, 462 U.S. at 161. Courts should forsake the traditional rule of

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[4] *Accord McCluny v. Silliman*, 28 U.S. (3 Pet.) 270, 277 (1830); *Campbell v. Haverhill*, 155 U.S. 610, 617 (1895); *Brady v. Daly*, 175 U.S. 148, 158 (1899); *McClaine v. Rankin*, 197 U.S. 154, 158 (1905); *Cope v. Anderson*, 331 U.S. 461, 463 (1947); *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U.S. 390, 397-98 (1906); *O'Sullivan v. Felix*, 233 U.S. 318 (1914); *Rawlings v. Ray*, 312 U.S. 96 (1941); *Holmberg v. Armbrecht*, 327 U.S. 392, 395 (1946); *Runyon v. McCrary*, 427 U.S. 160, 180-82 (1976); *DelCostello*, 462 U.S. at 158-59; *Wilson*, 471 U.S. at 266-67; *Agency Holding*, 483 U.S. at 147; *Owens v. Okure*, 488 U.S. 235 (1989); *Reed*, 488 U.S. at 323.

[5] By adopting state law, federal courts are relying on the states to balance the policy of repose with the substantive policy of providing a plaintiff reasonable time in which to bring a claim. *Wilson*, 471 U.S. at 271; and *id.* at 281 (O'Connor J., dissenting) ("In borrowing a state period of limitation for application to a federal cause of action, a federal court is relying on the State's wisdom in setting a limit . . . on the prosecution of a closely analogous claim.") (quoting *Johnson v. Railway Exp. Agency, Inc.*, 421 U.S. 454, 463-64 (1975)).

borrowing state law only "when a rule from elsewhere in federal law *clearly* provides a closer analogy than available state statutes, *and* when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial law making. . . . " *Id.* at 172 (emphasis added). Therefore, on rare occasions this Court will apply a federal limitations period where state law conflicts with or undermines federal policies.[6] Even then, this Court emphasizes that borrowing from federal law is a "narrow" and "closely circumscribed exception to the general rule that statutes of limitation are to be borrowed from state law. . . . '[R]esort to state law remains the norm for borrowing for limitations periods' ". *Reed*, 488 U.S. at 324 (quoting *DelCostello*, 462 U.S. at 171).

The first step in choosing the appropriate limitations period for § 10(b) claims is to determine whether such claims should be characterized uniformly or by a claim-by-claim approach. *See Agency Holding*, 483 U.S. at 147. Federal law governs this characterization. *Wilson v. Garcia*, 471 U.S. 261, 269-70 (1984). Second, this Court presumes that a state's statute of limitations will apply unless "federal law clearly provides a closer analogy" *and* "the federal policies at stake and the practicalities of litigation" make federal law "significantly more appropriate." *DelCostello*, 462 U.S. at 171-72.[7]

Applying this analysis here, this Court should uniformly characterize § 10(b) claims as actions for fraud and apply state statutes of limitations for common law fraud. Common law fraud provides a sufficiently close analogy to § 10b actions and is consistent with the federal policies at stake and the practicalities of litigation.

II. STATE COMMON LAW FRAUD STATUTES OF LIMITATION ARE SUFFICIENTLY ANALOGOUS, BEST IMPLEMENT THE FEDERAL POLICY BEHIND SECTION 10(b) AND ACCOMMODATE THE PRACTICALITIES OF LITIGATION.

A. All Private Actions Under Section 10(b) Should be Characterized the Same Way.

All the parties agree that private § 10(b) actions should be uniformly characterized in order "to avoid intolerable 'uncertainty and time-consuming litigation' " in determining the appropriate statute of limitations. *See Agency Holding*, 483 U.S. at 150 (quoting *Wilson*, 471 U.S. at 272).

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[6] *See Agency Holding*, 483 U.S. at 147 (applying the Clayton Act's limitation period, 15 U.S.C. § 15b, to civil RICO actions); *DelCostello*, 462 U.S. at 161 (limitation period of § 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), applied to a claim for breach of a collective bargaining agreement/duty of fair representation); *McAllister v. Magnolia Petro. Co.*, 357 U.S. 221, 224 (1958) (federal limitation period of the Jones Act applied to claim for unseaworthiness); *Occidental Life Ins. Co. of Cal. v. EEOC*, 432 U.S. 355 (1977) (refusing to apply short, state statute of limitations to EEOC enforcement actions under the Civil Rights Act of 1964); *Holmberg v. Armbrecht*, 327 U.S. 392 (1946) (doctrine of laches, rather than state law, applied to action to enforce federal equitable remedy).

[7] Of course, any analogy to § 10(b) is "bound to be imperfect," *see Wilson*, 471 U.S. at 272, but "the mere fact that state law fails to provide a perfect analogy to the federal cause of action is never itself sufficient to justify the use of a federal statute of limitations, . . . " *Agency Holding*, 483 U.S. at 147. *See also DelCostello*, 462 U.S. at 171 ("We do not mean to suggest that federal courts should eschew use of state limitations periods any time state law fails to provide a perfect analogy."). The search is for a *sufficiently* analogous state statute of limitation which is consistent with federal policy and the practicalities of litigation.

B. Federal Policies and Practicalities of Litigation Are Best Served By a Longer, Not a Shorter, Statute of Limitations.

1. The Fundamental Purpose Behind the Federal Securities Laws Is to Protect Investors by Ensuring Full Disclosure, Preventing Fraud, and Providing Relief to Defrauded Investors.

The fundamental purpose of the Securities Act of 1933 and the Securities Exchange Act of 1934 is to ensure full disclosure to investors and to prevent and punish fraud. *Randall v. Loftsgaarden*, 478 U.S. 647, 664 (1986); *Ernst & Ernst*, 425 U.S. at 195; *S.E.C. v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 186 (1963) ("a fundamental purpose [of the federal securities laws] . . . was to substitute a philosophy of full disclosure for the philosophy of *caveat emptor* . . . ").[8] This Court consistently holds that the securities laws are remedial in nature, to protect and provide relief to defrauded investors, and must be construed broadly to effectuate this purpose.[9] *Herman & MacLean*, 459 U.S. at 386-87; *Blue Chip Stamps*, 421 U.S. at 748; *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 151 (1972); *Capital Gains*, 375 U.S. at 195.

Within this statutory framework, § 10(b) was designed as a "catchall" antifraud provision to enable the Commission to handle novel and unforeseen types of securities fraud. *Ernst*

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[8] *See also* S. Rep. No. 47, 73d Cong., 1st Sess. (Apr. 27, 1933), *reprinted in* 2 J. Ellenberger & E. Mahar, *Legislative History of the Securities Act of 1933 and Securities Exchange Act of 1934*, Item 17 (1973) ("The basic policy is that of informing the investor of the facts concerning securities to be offered for sale . . . and providing protection against fraud and misrepresentation.").

[9] The Court's broad interpretation of the antifraud provisions in the Acts is consistent with "Congressional intent that the courts construe the antifraud provisions of the federal securities laws broadly . . . " 98 Cong. Rec. H7760 (July 25, 1984) (remarks of Rep. Wirth).

& Ernst, 425 U.S. at 203. Ever since *Kardon v. National Gypsum Co.*, 69 F.Supp. 512 (E.D.Pa. 1946), implied a private right of action under § 10(b), it has become *the* most important weapon in combatting securities fraud.[10] Private § 10(b) actions constitute "an essential tool for enforcement of the 1934 Act's requirements," *Basic, Inc. v. Levinson*, 485 U.S. 224, 231 (1988), and provide a "necessary supplement to commission action," *Blue Chip Stamps*, 421 U.S. at 730 (quoting *J.I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964)).[11]

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[10] Petitioner acknowledges that most security fraud cases are filed under § 10(b) and Rule 10b-5. *See* Pet.'s Br. at 21 ("§ 10(b) and Rule 10b-5 'may well be the most litigated provisions in the federal securities laws.' ") (quoting *S.E.C. v. National Sec., Inc.*, 393 U.S. 453, 465 (1969)). *See also* Guin & Donaldson, *The Insider Trading and Securities Fraud Enforcement Act: Has Congress Supplied a Limitations Period Appropriate For Use In Private 10b-5 Actions?*, 47 Wash. & Lee L. Rev. 541, 573 (1990); H. Bloomenthal, *Securities Law Handbook* § 12.01 at 317 (1987-88 ed.) (Rule 10b-5 has become "a utilitarian fraud remedy for private claimants").

[11] Private actions have become increasingly important as an enforcement tool in light of the dramatic growth of fraud and corruption in the nation's business community and financial institutions. *See, e.g.*, Schultz, *Ripoff Roundup – Beware: Investment Fraud in the '90's Will Claim A Wider Range of Victims*, Wall St. J., Oct. 19, 1990 at p. R24, col. 1 (*see infra* note 39); *White-Collar Crime: Booming Again – Economic Pressures, a New Permissiveness and Simple Greed Are Eroding Corporate Morality*, N.Y. Times, June 9, 1985, § III at 1 ("A corporate crime wave appears to be exploding across the nation. Not since the mid-1970s when a series of foreign corporate bribes and illegal political contributions shocked the body politic, have there been so many deep gashes in corporate America's moral armor"); *Captain Money and The Golden Girl*, Forbes, July 1, 1985 at 72 ("We live in an era of unprecedented financial

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Therefore, federal policy is to encourage private litigation of § 10(b) claims. *Basic*, 485 U.S. at 245 ("facilitating Rule 10b-5 litigation supports the congressional policy embodied in the 1934 Act"); *see also Pinter v. Dahl*, 486 U.S. 622, 633

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fakery. Billions of dollars of worthless securities and financial instruments are being foisted on the public").

The SEC and the states simply do not have the resources to stem the growing tide of corruption. *See Inundated Agency, Busy SEC Must Let Many Cases, Filings Go Uninvestigated*, Wall St. J., Dec. 16, 1985 at 1:

> "The SEC is horribly overmatched by the bad guys in the marketplace," declares Royce Griffin, the president of the North American Securities Administrators Association. . . .
>
> But concerns about the SEC's workload are growing. A recent report by an American Bar Association task force says the enforcement staff may be too small "for the Commission to effectively discharge its statutory responsibilities. . . . "
>
> Chairman Shad points out that the SEC isn't the sole defense against false or misleading financial statements. If anything is seriously amiss, he contends, "you can be sure the private bar will be in there with class-action suits."

See also Bateman Eichler, Hill Richards, Inc. v. Berner, 472 U.S. 299, 315 (1985) ("The SEC has advised us that it 'does not have the resources to police the industry sufficiently . . . ' "); H.R. Rep. No. 355, 98th Cong. 1st Sess. 6 (1983), *reprinted in* 3 Fed. Bar Ass'n. Sec. L. Comm., *Federal Securities Law Legislative History 1933-1982*, Item 249, p. 4889 ("in recent years, the securities markets have grown dramatically in size and complexity, while Commission enforcement resources have declined"); 98 Cong. Rec. H2982 (daily ed. May 17, 1983) ("The SEC historically has been a lean agency, and in recent years, the areas within its jurisdiction have expanded dramatically. . . . In the three years since the SEC's last authorization, the value of [registered] public offerings . . . has risen almost 100 percent. The number of investment companies has risen almost 40 percent, and investment company assets have risen almost 200 percent. The volume of shares traded in the markets has grown 80 percent. The number of broker-dealers has grown 20 percent. . . . The SEC has told us that problems in the area of financial statement fraud are growing dramatically . . . ") (remarks of Rep. Wirth).

(1988) (recognizing "the congressional policy favoring private suits as an important mode of enforcing federal securities statutes").[12] For these reasons, the "policies of the federal securities laws are best served by a longer, not a shorter, statute of limitations." *Berry Petro. Co. v. Adams & Peck*, 518 F.2d 402, 409 (2d Cir. 1975) (quoting *United Cal. Bank v. Salik*, 481 F.2d 1012, 1015 (9th Cir. 1973), *cert. denied*, 414 U.S. 1004 (1973)).

2. The Practicalities of Section 10(b) Litigation Require a Discovery-Based Statute of Limitations that Is Not Subject to a Three Year Period of Repose.

The distinguishing feature of § 10(b) litigation is the requirement of scienter.[13] *See Ernst & Ernst*, 425 U.S. at 199, 201. It is the very nature of fraud that it is difficult to detect by virtue of the malfeasor's intentional acts or omissions. *See* American Bar Association, *Report of the Task Force on Statute of Limitations for Implied Actions*, 41 Bus. Law. 645, 654 (1986) ("*ABA Task Force Report*") ("such concealment is inherent in most securities fraud cases"). Consequently, even the most sophisticated plaintiffs often are not able to "discover fraud until long after its perpetration," especially in

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[12] Legislative history to the Insider Trading Act, 15 U.S.C. § 78t-1, reveals Congress' awareness of and approval that private § 10b claims "have traditionally served as an important supplement to the Commission's enforcement of federal securities laws." H.R. Rep. No. 910, 100th Cong., 2d Sess. 26, (testimony of S.E.C. Chairman Ruder) *reprinted in* 1988 U.S. Code Cong. & Admin. News 6063.

[13] While § 9(e) of the 1934 Act, 15 U.S.C. § 78i(e), may require scienter, it applies to a very limited class of defendants and transactions. Further, § 9(e) violations, as well as other stock market fraud, do not go long unnoticed due to the SEC's record-keeping and investigatory functions and the degree to which the national exchanges are scrutinized.

complex, interstate investment schemes.[14] *Id.* at 656. For example, in "Ponzi" schemes, bond defaults, limited partnerships and other complex investment scenarios, it may take significantly more than three years to detect any wrongdoing.[15] Investors can be easily deceived with continued promises of high returns, periodic payments of "profits" or

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[14] The SEC confirms that "as the securities markets have grown in size and complexity, frauds have become increasingly difficult to discover." SEC's *Amicus* Br. at 24. "Indeed, even the SEC with all its investigative resources and statutory powers, including compulsory investigative processes, does not complete its investigations, on average, in less than 2.25 years." *Id.* at 24, n.37. In its experience it has found that "a considerable number of frauds are simply not detected within [three years]." *Id.* at 25. Therefore, it is not simply "the most trusting or somnolent investors," *Short v. Belleville Shoe Mfg. Co.*, 908 F.2d 1385, 1392 (7th Cir. 1990), *cert. pending*, (No. 90-526), that do not discover fraud within three years. Often times, even reviewing published financial statements may not reveal fraud. Moreover, investors do not invest with the thought of looking for fraud especially when stockbrokers or general partners have a fiduciary obligation of full disclosure. If investors then receive audited financial statements, showing assets, growth earnings, gains and the like, they will be even less likely to look for fraud. Yet, it is precisely this type of information that will cause a person to be "somnolent" even though this information actually might be hiding a massive fraud.

[15] "Ponzi" schemes are specifically designed to deceive the investor into thinking he is receiving a profit on his investment when actually he is only receiving money invested by other victims. For example, in *In re Home-Stake Production Co. Sec. Litig.*, 76 F.R.D. 351 (N.D.Okla. 1977), investors in oil and gas drilling operations received quarterly progress reports indicating that substantial oil was being produced, and received quarterly "profits" which were actually money received from subsequent investors. Even a lawsuit by the SEC did not reveal the fraud. For other cases involving "Ponzi" schemes, see Guin & Donaldson, *supra* note 10, at 569 n.168. With a three year period of repose, "the malfeasor can insulate himself from liabilities simply by paying the phoney return until the statute expires." *Id.* at 569. *See generally* Bond Investors Association ("BIA") *Amicus* Br. at Section I. for a thorough discussion of "Ponzi" schemes and bond defaults.

glowing, audited financial statements. Accordingly, this Court has twice recognized that the longer limitations periods traditionally available under state law are consistent with the scienter requirement of § 10(b). *Ernst & Ernst*, 425 U.S. at 210, n.29; *Herman & MacLean*, 459 U.S. at 384 n.18.

In light of the investor-oriented, remedial purpose of the federal securities laws, the limitations period applied to § 10(b) claims must take into account the practical difficulty of discovering fraud and provide a reasonable amount of time for a plaintiff to file a claim. This is precisely the practicalities of litigation this Court has consistently examined when determining whether state law provides an appropriate statute of limitations. In *DelCostello*, this Court applied the six month limitation period of § 10(b) of the N.L.R.A. because state limitation periods for actions to vacate an arbitration award (typically between 10 and 90 days) are simply too short "to provide an aggrieved employee with a satisfactory opportunity to vindicate his rights under § 301 and the fair representation doctrine." 462 U.S. at 166 (footnote omitted). State law suffered from these "flaws . . . of practical application" and thereby frustrated the federal policy of allowing an employee sufficient opportunity to bring a claim.[16] *Id.* at 165; *see also Reed*, 488 U.S. at 328, n.4. In *Agency Holding*, this Court applied the limitations period of the Clayton Act to civil RICO claims partly for the reason that the states' limitation periods were "unduly short" to allow a plaintiff to bring a claim and thus, "would thwart the

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[16] The Court also considered and rejected state limitation periods for legal malpractice for the reason such limitation periods (from two to six years) are too long and conflict–with the policy of "rapid final resolution of labor disputes. . . . " *DelCostello*, 462 U.S. at 168. Contrary to securities fraud, the type of injury involved in *DelCostello* (breach of a collective bargaining agreement and the duty of fair representation) does not involve the issue of discovery.

legislative purpose of creating an effective remedy."[17] 483 U.S. at 154. In *Occidental Life Ins. Co. of Cal. v. EEOC*, 432 U.S. 355 (1977), this Court refused to apply a short, state limitations period to EEOC enforcement actions. The one year, state limitations period would have placed too great a burden on the EEOC to bring such actions and, therefore, was "inconsistent with the congressional intent underlying the" Civil Rights Act of 1964. 432 U.S. at 369. In *McAllister v. Magnolia Petro. Co.*, 357 U.S. 221 (1958), this Court applied federal law because the shorter, state limitations period did not accommodate "the practicalities of admiralty personal injury litigation" and did not allow a plaintiff sufficient time in which to bring an unseaworthiness claim. 357 U.S. at 224. In *Holmberg v. Armbrecht*, 327 U.S. 392 (1946), state statutes of limitations were inappropriate because they could potentially cut off an action to enforce a federal equitable remedy. 327 U.S. at 397. In all of these instances, this Court applied a *longer*, federal limitations period instead of a shorter, state

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[17] Another factor considered was that RICO encompasses a wide variety of divergent federal and state claims which could potentially provide an analogy for statute of limitations purposes. Civil RICO claims include "nine state law felonies and violations of over 25 federal statutes, including those prohibiting bribery, counterfeiting, embezzlement of pension funds, gambling offenses, obstruction of justice, interstate transportation of stolen property, and labor crimes," *Agency Holding*, 483 U.S. at 149 (quoting *A.J. Cunningham Packing Corp. v. Congress Fin. Corp.*, 792 F.2d 330, 337 (3rd Cir. 1986) (Sloviter, J., concurring)) and can be "analogized to breach of contract, fraud, conversion, tortious interference with business relations, misappropriation of trade secrets, unfair competition, usury, disparagement, etc.. . . . " *Id.* (quoting *Malley-Duff & Assocs., Inc. v. Crown Life Ins. Co.*, 792 F.2d 341, 348 (3d Cir. 1986) *aff'd*, 483 U.S. 143 (1987)). Here, while § 10(b) can be analogized to common law fraud, state blue sky laws, breach of fiduciary duty and negligence, the galaxy of analogous claims "is not as impressive as under RICO as it inevitably comes back to some form of fraud, manipulation or deceit." 11 H. Bloomenthal, *Securities & Federal Corporate Law Report* (hereinafter "SFCLA"), at 10 (Feb. 1989).

period which would have thwarted federal policy by not allowing a plaintiff sufficient time to seek redress under the applicable statute.

Courts, Congress and state legislatures have recognized these practicalities in fraud claims. In light of the practical difficulty of discovering fraud, courts have almost universally applied a "discovery" rule. *See* Shapiro & Blouner, *Securities Litigation in the Aftermath of In re Data Access Securities Litigation*, 24 New Engl. L. Rev. 537, 549-50 (1989). The clock does not begin to run until plaintiff knew or should have known of the fraud. The federal version of this rule, the doctrine of equitable tolling, has long been recognized by this Court and is "read into every federal statute of limitation," particularly "as to fraud." *Holmberg*, 327 U.S. at 397; *see also Bailey v. Glover*, 88 U.S. (21 Wall.) 342, 348 (1874); *Cook v. Avien, Inc.*, 573 F.2d 685, 694-5 (1st Cir. 1978); *United States v. Lovknit Mfg. Co.*, 189 F.2d 454, 457 (5th Cir.) ("actions for a *fraud* do not ordinarily accrue till the fraud is discovered or should with diligence have been discovered") (Court's emphasis), *cert. denied*, 342 U.S. 896 (1951). In the Interstate Land Sales Act, Congress recognized the importance of a limitations period that runs from discovery and is not subject to a period of repose. *See* 15 U.S.C. § 1711(a)(2). *See infra* Section III.B.1. Similarly, state legislatures have long established that the limitations period for fraud does not begin to run until constructive discovery, *see* Shapiro, *supra*, at 549-50, and recently, several states have amended their blue sky laws to allow a plaintiff *more* time in which to bring a claim.[18] Any argument that a longer statute of limitations

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[18] Within the last several years, at least six states have *extended* their statutes of limitations for blue sky actions. Arkansas extended its statute from two years to five years from sale. *Compare* former Ark. Stat. Ann. § 67-1256(e) (1966) *with* Ark. Stat. Ann. § 23-42-106(f) (1987). Florida entirely eliminated its "two years from sale" limitation. *Compare*

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will permit a plaintiff to delay filing a claim after fraud has been discovered, hoping the value will go up but intending to shift further risk of loss to potential defendants, is of no avail. Courts have the ability to deal with any such abuse. *See Randall*, 478 U.S. at 666.

C. Common Law Fraud Is Sufficiently Analogous to Section 10(b) and Is Consistent With Policies and Practicalities of Securities Litigation.

The characterization of § 10(b) claims "for statute of limitations purposes is derived from the elements of the cause of action, and Congress' purpose in providing it." *See Wilson*, 471 U.S. at 268. Section 10(b) is a fraud-based action. Its elements parallel those of common law fraud. Each requires proof of a representation, its falsity or material omission, reliance thereon, damages caused by the wrongdoing and scienter on the part of defendant.[19] *See Ernst & Ernst*, 425

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former Fla. Stat. § 301.1 (1976) *with* Fla. Stat. § 517.301 (1988). Hawaii recently adopted a rule of two years from discovery, but no more than seven years from sale. Hawaii Rev. Stat. § 485-20.5 (1985). Indiana increased its statutory period from "two years from sale" to three years from discovery. *Compare* former Ind. Code § 23-2-1-19(e) (1967) *with* Ind. Code § 23-2-1-19(g) (1989). Oregon extended its statute of limitations from "three years after the sale" to two years from discovery or three years from sale, whichever is longer. *Compare* former ORS 59.115(5) (1983) *with* ORS 59.115(5) (1989). Vermont lengthened its period from "two years from sale," to three years from discovery, or six years from the transaction, whichever occurs first. *Compare* former Vt. Stat. Ann. tit. 9, § 4225 (1984) *with* Vt. Stat. Ann. tit. 9, § 4240(f) (1990 Supp.). Moreover, at least within the last ten years, no state has *shortened* its statute of limitations for blue sky violations.

[19] "[A] claim under Rule 10b-5 certainly has some relationship" to the tort of deceit and misrepresentation. *Blue Chip Stamps*, 421 U.S. at 744. Rule 10b-5 and common law fraud differ primarily in that, for a Rule 10b-5 case, the fraud must be "in connection with the purchase or

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U.S. at 193; *Basic*, 485 U.S. at 243; *see generally* L. Loss, *Fundamentals of Securities Litigation* 712-23 (2d. ed. 1988) ("Loss"); *Prosser and Keeton on the Law of Torts* § 105 at 728 (W. Keeton 5th ed. 1984). Further, both common law fraud and § 10(b) apply to those directly at fault and to those

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sale" of a security, *see id.*, and a plaintiff is subject to a lighter evidentiary burden. A plaintiff need only prove securities fraud by a preponderance of the evidence, rather than by clear and convincing evidence, *Herman & MacLean*, 459 U.S. at 390, and there is a rebuttable presumption of reliance if there is a duty to disclose, fraud-on-the-market or a material misstatement or omission in a proxy statement, *Basic*, 485 U.S. at 245, 250. In light of the investor-oriented, remedial purpose of the federal securities laws, these evidentiary burdens were relaxed to enable a plaintiff to more easily prove securities fraud and to extend liability "to a broader reach than the common law had previously permitted. . . . " *Id.* at 253 (White, J., concurring in part, dissenting in part); *see Herman & MacLean*, 459 U.S. at 390 (lighter standard of proof justified by fundamental purpose of securities laws to protect investors: "If they prove that it is more likely than not that they were defrauded, they should recover."). Thus, plaintiffs are able to bring class action suits for nationwide securities fraud or maintain actions for securities bought on a national market, where such actions would not be possible under traditional common law fraud theories.

Petitioner uses these procedural distinctions between § 10(b) and common law fraud to argue that common law fraud does not provide a sufficient analogy. Instead, Petitioner argues for a draconian one year limitation/three year repose period which would make it harder for plaintiffs to obtain *any* relief for fraud under the federal securities laws. Simply because § 10(b) arises out of a different historical context than common law fraud and is subject to fewer evidentiary and procedural burdens, is not a sufficient reason to look to federal law and ignore over 150 years of precedent and 45 years of congressional acquiescence of looking to state law for the applicable statute of limitations. The inquiry is whether applying common law fraud limitation periods is consistent with the policy of preventing fraud and providing relief to defrauded investors, and accommodates the practicalities of § 10(b) litigation.

who aid and abet the primary wrongdoer.[20] In contrast, the federal express remedies apply only to specific categories of defendants. *See infra* Section III.A. In light of the identity of purpose and substantive elements between § 10(b) and common law fraud, common law fraud is sufficiently analogous to § 10(b) for statute of limitations purposes.

Statutes of limitations for common law fraud are designed to accommodate the same practicalities which face a § 10(b) plaintiff. In both, the requirement of scienter necessarily involves a situation where the wrongdoing goes undetected by virtue of the intentional acts or omission of the defendant.[21] Therefore, these limitation periods are of sufficient length[22] to accommodate the practicalities of § 10(b) litigation, and promote the federal policy of providing relief to defrauded investors and facilitating private enforcement of the securities laws.

1. The *Wilson* Approach Should Be Applied to Achieve a Necessary Degree of Uniformity and Certainty.

In *Wilson*, this Court balanced interests in uniformity with the traditional rule of borrowing state law by ruling that federal courts should apply personal injury statute of limitations to § 1983 claims under the Civil Rights Act of 1871, 42

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[20] *See* Restatement (Second) of Torts § 876 (1979); *Harmsen v. Smith*, 693 F.2d 932, 943 (9th Cir. 1982), *cert. denied*, 464 U.S. 822 (1983); *Saltzman v. Zern*, 407 F.Supp. 49, 53-57 (E.D. Pa. 1976); Loss, *supra*, at 1020-21. In *Pinter v. Dahl*, 486 U.S. 622, 654 (1987), this Court rejected the "substantial factor" test in determining a "seller" under § 12(1) of the 1933 Act.

[21] Because the tort of deceit contemplated situations involving face-to-face transactions, *Basic*, 485 U.S. at 243-4, the fraudulent act should be discovered, theoretically, sooner than with a § 10(b) violation. Therefore, a § 10(b) plaintiff should certainly not be provided *less* time than what is allowed for common law fraud in which to discover fraud and bring a claim.

[22] Common law fraud statutes of limitation are, generally, two to six years and start to run when plaintiff discovers or reasonably should have discovered the fraud. *See* ABA Task Force Report, *supra*, at 650.

U.S.C. § 1983. Section 1983 claims can be analogized to a "wide diversity of claims." *Wilson*, 471 U.S. at 275. Analogizing § 1983 actions to personal injury claims best covered the broad range of tort remedies embraced by § 1983 and, thus, was consistent with the "statute's remedial purpose." *Id.* at 272. By uniformly characterizing § 1983 claims, this Court accommodated "[t]he federal interests in uniformity, certainty, and the minimization of unnecessary litigation. . . . " *Id.* at 275; *see also Reed*, 488 U.S. at 326 (characterizing § 101(a)(2) claims under Labor-Management Reporting and Disclosure Act as personal injury claims resolved problem of uncertainty and lack of uniformity in statutes of limitation).

Here, uniform characterization of § 10(b) actions as involving claims for common law fraud "minimizes the risk that the choice of a state statute of limitations would not fairly serve the federal interests" at issue or would not accommodate the practicalities of litigation. *Wilson*, 471 U.S. at 279.[23] Therefore, the concern for

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[23] Even in cases involving several states, a conflict of law analysis may be unnecessary. *Brick v. Dominion Mortgage & Realty Trust*, 442 F.Supp. 283, 300 (W.D.N.Y. 1977). The statute of limitations of the forum state will govern. *See, e.g., Nortek, Inc. v. Alexander Grant & Co.*, 532 F.2d 1013, 1015 (5th Cir. 1976), *cert. denied*, 429 U.S. 1042 (1977). Use of the forum state statute of limitations is constitutional. *Sun Oil Co. v. Wortman*, 486 U.S. 717 (1988). Because state common law fraud statutes of limitations are discovery-based, it would be unusual for a case to involve plaintiffs from multiple states and a choice of law issue on the statutes of limitations that is material to the outcome. Once a plaintiff discovers fraud it is unlikely he will wait more than two years to file suit. The Ninth Circuit, which applies the forum state's common law fraud statute of limitations, *see infra*, note 63, has not encountered the problems that the Third and Seventh Circuits had in choosing the appropriate statute of limitations. Neither party has cited a case where multiple statutes of limitations were applied other than *Kronfeld v. Advest, Inc.*, 675 F.Supp. 1449 (S.D.N.Y. 1987), in which the court had no trouble managing the issue. Other cases have refused to deny class certification on the issue and have suggested that a single statute of limitations could be applied in a case involving diverse plaintiffs. *See In re Nat'l Student Marketing Litig.*, Fed. Sec. L. Rep., (CCH) ¶ 97,926 (D.D.C. March 26, 1981); *State Teachers Retirement Bd. v. Fluor Corp.*, 80 F.R.D. 142 (S.D.N.Y. 1978).

certainty and uniformity can be resolved while accommodating the policies and practicalities involved in § 10(b).

D. State Blue Sky Statutes Are Not as Analogous as Common Law Fraud.

Many state blue sky statutes differ significantly from § 10(b) and, thus, are not sufficient analogies. Most state blue sky laws which provide for private causes of action are modeled after § 410(a) of the Uniform Securities Act, which is itself modeled after § 12 of the 1933 Act.[24] Loss, *supra*, at 878; *see, e.g., Capri v. Murphy*, 856 F.2d 473, 478 (2d Cir. 1988). Like § 12, but unlike § 10(b), most blue sky laws do not require proof of reliance, causation or scienter, *see* Guin & Donaldson, *supra* note 10, at 580-81, and are quite limited in scope.[25] Accordingly, the limitations periods in blue sky laws are not as appropriate as common law fraud statutes of limitations for § 10(b) claims.

III. THE EXPRESS FEDERAL REMEDIES ARE NOT CLEARLY MORE ANALOGOUS THAN STATE LAW, AND APPLYING A ONE YEAR/THREE YEAR LIMITATIONS PERIOD WOULD CONFLICT WITH FEDERAL POLICY AND THE PRACTICALITIES OF LITIGATION.

The presumption of borrowing state statutes of limitations is overcome only if "federal law *clearly* provides a closer analogy" than state law and is consistent with federal policy and practicalities of litigation. *DelCostello*, 462 U.S. at 172 (emphasis added). The express actions under the 1933

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[24] Since most blue sky private remedies are identical to § 12, it is not possible for the express remedies of the Acts to be *more* analogous than these statutes.

[25] Under some blue sky laws only purchasers of securities can sue for fraud, *see Data Access*, 843 F.2d at 1544, others require the defendant to be a seller or require privity, and others do not cover the broad scope of activity prohibited by § 10(b). *See generally* Shapiro & Blauner, *supra*, at 563. Generally, blue sky statutes vary considerably from state to state and come "in a variety of shapes and sizes." Loss, *supra*, at 877-79.

and 1934 Acts[26] are not clearly more analogous than common law fraud. They do not require the same elements of proof as in § 10(b) cases, do not address the same type of culpable conduct, and cover a much narrower class of persons and activities. The unduly short three year period of repose would clearly frustrate the federal policies of ensuring complete disclosure, providing relief to defrauded investors and facilitating private enforcement. Further, the practical difficulty of discovering fraud within three years, recently noted by Congress, mandates against the imposition of a three year statute of repose.

A. The One Year/Three Year Limitations Period of the Express Remedies of the 1933 and 1934 Acts Does Not Clearly Provide a Closer Analogy than Common Law Fraud.

Sections 11 and 12 of the 1933 Act and § 18 of the 1934 Act, unlike § 10(b), do not require proof of scienter, reliance

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[26] The 1933 Act provides express rights of action under § 11, 15 U.S.C. § 77k, which prohibits misleading statements or omissions in a registration statement, § 12(1), 15 U.S.C. § 77l(1), which prohibits the unlawful sale of an unregistered security and § 12(2), 15 U.S.C. § 77l(2), which prohibits the sale of a security through false or misleading statements. Section 13 of the 1933 Act, 15 U.S.C. § 77m, provides the limitations period for §§ 11 and 12.

The 1934 Act provides for express causes of action under § 9(e), 15 U.S.C. § 78i(e); § 16(b), 15 U.S.C. § 78p(b); § 18(a), 15 U.S.C. § 78r(a), and § 29(b), 15 U.S.C. § 78cc(b). Section 9(e) prohibits manipulation of securities prices by brokers or dealers on national securities exchanges. Section 16 prohibits unlawful profits from the purchase or sale of securities within six months, i.e., short-swing profits. Section 18(a) imposes liability for misleading statements in any document filed with the SEC. These sections each provide for a variation of a one year from discovery/three year from sale statute of limitations, except for § 16(b) which requires that suits be brought no later than two years after the unlawful profit was realized. Petitioner concedes that § 16(b) is not an appropriate choice for § 10(b) claims. Pet.'s Br. at 43.

or causation, and place upon the defendant the burden of establishing good faith. *See, e.g., Currie v. Cayman Resources Corp.*, 835 F.2d 780, 782 (11th Cir. 1988); *see generally* Loss, *supra*, at 883-900. These are strict liability and negligence provisions and do not require proof of an intent to deceive, manipulate or defraud.[27] Further, the class of potential

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[27] A relatively short statute of repose may be appropriate where a person may be found liable for conduct that does not involve scienter and the defendant has the burden of proving due diligence. The situation is different with § 10(b) (and with common law fraud) where a defendant intentionally commits fraud and the plaintiff has the burden of proof on all elements of the claim. The legislative history of the 1934 Act indicates that Congress enacted the short, three year statute of repose in light of the relatively light burden placed upon a plaintiff in relation to the express remedies. As Petitioner points out, during Senate debate on the appropriate limitations period, Senator Barkley stressed the difficulties in discovering fraud within three years:

> It would be manifestly unfair . . . to limit any damaged party to 1 year or 2 years or 3 years in the bringing of a suit, because it may sometimes take 4 or 5 years to discover that a fraud has been committed in a statement of facts or in the omission of a statement with reference to a share of stock or a report which may be made based upon the condition of a company.

Pet.'s Br. at 40, n.58 (quoting 78 Cong. Rec. 8201 (May 7, 1934) (Statement of Sen. Barkley)). But Petitioner failed to include the following response by Senator Austin:

> I inquire of the Senator from Kentucky whether he does not recognize another exceptional circumstance in that the burden of proof is shifted around on the question of knowledge or wilfulness in a misrepresentation. The committee has put the burden upon the defendant, so that in this case the plaintiff does not have to spend any time going out and seeking his evidence. All he has to prove is the fact of misrepresentation.

78 Cong. Rec. 8201 (1934); *see also Herman & MacLean*, 459 U.S. at 382 ("§ 11 places a relatively minimal burden on a plaintiff. In contrast, § 10(b) . . . requires . . . a heavier burden to establish a cause of action.").

plaintiffs and defendants is much narrower than under § 10(b).[28]

Petitioner contends § 9 of the 1934 Act is the "closest analog for § 10(b)." Pet.'s Br. at 34. While § 9 may require scienter[29] it also is too limited for purposes of analogizing to § 10(b). This section applies only to brokers or dealers who deal directly with investors and only to securities registered on a national securities exchange. *See generally* 5 A. Jacobs, *Litigation and Practice Under Rule 10b-5*, § 3.02[c], (rev. ed. 1990). Accordingly, § 9(e) is not an effective remedy for defrauded investors and "has been a dead letter so far as producing recoveries is concerned." Loss, *supra*, at 920. *See also* 11 SFCLR, *supra* note 17, at 18 ("Neither Section 9(e) nor Section 18(a) . . . has spawned much litigation.").

Violations of the express remedies, especially § 9, are generally discovered in a relatively short amount of time given the degree to which the national securities exchanges are scrutinized and the extent to which the SEC monitors

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[28] Section 11 claims can only be brought by a purchaser of a registered security, *see Herman & MacLean*, 459 U.S. at 382, and the universe of potential defendants is limited to persons who signed the registration statement, directors or partners of the issuer at the time the statement was filed, underwriters and experts who prepared or certified any portion of the statement. Actions under § 12 may be brought only by purchasers against sellers of a security. *See Pinter*, 486 U.S. at 641-47. Likewise, § 18 applies only to persons who make, or cause to be made, false filings with the SEC. Section 29(b) is also too limited in scope. It applies only to contracts and merely provides a remedy of rescission.

[29] *But see* Loss, *supra*, at 920 ("[a]lthough § 9(e), apart from some of the substantive provisions in § 9(a)-(d), does not require proof of scienter . . . "). Under § 9(e) a plaintiff must show that the defendant "willfully" participated in the manipulation of stock prices. However, this does not impose a difficult burden if there is any proof the defendant participated in the manipulation, in light of the loose manner in which courts have interpreted "willfully." *Id.* at 921. Yet, at the same time, § 9(e) has a strict causation requirement which is difficult for plaintiffs to satisfy. *Id.* at 920.

publicly traded securities. *See* SEC *Amicus* Br. at 19 n.27; *see also* Sontag, *Time May Not Be On Their Side*, Nat'l. L. J., Dec. 31, 1990, at 1, col. 3 ("stock market frauds . . . often are uncovered relatively early by market forces . . . "). Therefore, the short, three year period of repose is appropriate for the express actions given the ease of early detection of these violations,[30] the relatively light burden placed on plaintiffs to establish liability and the rather narrow class of persons and contexts in which the express remedies apply.[31]

1. The Express Statutes of Limitations Differ from Each Other.

Not only are the express rights of action not clearly more analogous to § 10(b), no two limitation periods are alike.[32]

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[30] Section 10(b) actions, on the other hand, often involve fraud in relation to unregistered and exempt securities, such as limited partnerships (as in this case), municipal bonds, tax shelters, real estate transactions, venture capital deals and so forth. These private transactions do not benefit from the two levels of institutional oversight provided by the SEC and the national exchanges. Thus, investors often have no access to any organized and regulated method of ongoing reporting and are provided information only at the whim of the promoter.

[31] *See infra*, n.38.

[32] The limitation periods for §§ 11 and 12 are provided in § 13 of the 1933 Act, 15 U.S.C. § 77m. In a § 11 action the period begins to run with the discovery of the untrue statement or omission, or after such discovery should have been made with reasonable diligence; but an action cannot be filed "more than three years after the security was bona fide offered to the public." The period for a § 12(1) action is one year after "the violation," and no more than three years after a bona fide offering to the public. Under § 12(2) the limitation period starts, as in § 11, one year after the discovery of the untrue statement or omission, or after such discovery should have been made; but cannot be brought more than three years after sale.

Under the 1934 Act, the period for § 9(e) begins one year after discovery of the facts constituting the violation, but no more than "three

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Simply adopting a uniform one year/three year period will not lead to uniformity or certainty, but will lead to confusion as to *which* rule to apply. This is demonstrated by the holdings in *Data Access*, *supra*; *Short*, *supra*, and *Ceres Partners v. GEL Assocs.*, 918 F.2d 349 (2d Cir. 1990). *Data Access* held that the applicable statute of limitations for § 10(b) is "one year after the plaintiff discovers the facts constituting the violation, and in no event more than three years after such violation." 843 F.2d at 1550. This limitation period has no exact counterpart in either Act. *Short*, on the other hand, applied the limitation period of § 12(2), 908 F.2d at 1390-91, which allows for constructive discovery, contrary to § 9(e) and *Data Access*. *Ceres Partners* held that the limitation periods of §§ 9(e) and 18(a) govern Rule 10b-5 actions. 918 F.2d at 364. However, as discussed *supra*, the limitation periods for those sections are not identical.[33] *See also Davis v. Birr, Wilson & Co., Inc.*, 839 F.2d 1369, 1376 (9th Cir. 1988) (Aldisert, J., concurring) (recommending the adoption of a rule limiting § 10(b) to "one year after the plaintiff discovers the facts, and in no event more than three years after the transaction in

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years after such violation." 15 U.S.C. § 78i(e). However, with § 18(c), the period starts one year after the discovery of the facts constituting the "cause of action," but no more than three years after "such cause of action accrued." 15 U.S.C. § 78r(c). An action to rescind a contract under § 29 must be brought within one year after discovering that a sale or purchase involved a violation but no more than three years after such violation. 15 U.S.C. § 78cc(b). The variation in these limitation periods demonstrates Congress' intent to establish limitation periods that are specifically suited to each particular remedy.

[33] The limitation periods for §§ 9(e) and 18(a) begin with discovery of the facts constituting the cause of action, but § 9(e) has a three year repose after the "violation," while § 18(c) has a three year repose after the "cause of action accrued." The point at which a violation occurs is not necessarily when a cause of action accrues. *See* SEC *Amicus* Br. at 21, n.30.

question" which is not identical to any of the express limitation periods or to the rules adopted in the Second, Third and Seventh Circuits).[34]

2. Private Actions Under Section 10(b) Have Been Shaped by this Court Upon the Assumption that the Applicable Limitation Period Is Longer than the Express Limitation Periods.

This Court has twice acknowledged that the express limitation periods do not apply to § 10(b) private actions. *See Ernst & Ernst*, 425 U.S. at 210, n.29; *Herman & MacLean*, 459 U.S. at 384, n.18. While the Court did not specifically address this issue, the holdings in these cases were premised upon the assumption that the limitation period for § 10(b) actions are longer than for the express remedies. Scienter was considered appropriate for Rule 10b-5 actions, *Ernst & Ernst*, 425 U.S. at 208-210, and §§ 10(b) and 11 were held to be cumulative, *Herman & MacLean*, 459 U.S. at 384, primarily because the procedural restrictions within the express actions (short limitations period and a bond requirement)[35] do not

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[34] Courts not only disagree over *which* one year/three year period to apply, but also in how they interpret the same limitations period. For instance, courts are divided whether the one year period in § 12(1) is subject to a discovery rule or the equitable tolling doctrine for fraudulent concealment. *See* Loss, *supra*, at 989. Further, the limitation periods in the 1934 Act do not contain a due diligence requirement, but several courts have nevertheless read such a requirement into the Act. *See, e.g., Goldenberg v. Bache & Co.*, 270 F.2d 675, 681 (5th Cir. 1959) (reasonable diligence requirement read into one year discovery period of § 29(b)) (citing *Holmberg*, 327 U.S. 392); *Lorenz v. Watson*, 258 F.Supp. 724, 734-35 (E.D. Pa. 1966) (reasonable diligence requirement read into § 15(c)(1)); *see also* 11 SFCLR, *supra* note 17, at 19 (due diligence requirement should be read into 1934 Act since this is consistent with congressional intent).

[35] These cases compared § 10(b) with §§ 11 and 12. However, §§ 9 and 18 contain the same procedural restrictions. *See* 15 U.S.C. §§ 78i(e), 78r(a), (c).

apply to Rule 10b-5 claims.[36] Since the law of § 10(b) private actions has been shaped by the assumption that the one year/three year limitations periods do *not apply*, it is fundamentally incorrect to suggest otherwise. Petitioner's argument simply ignores this historical development of § 10(b) private actions.[37]

B. A Three Year Period of Repose Would Undermine Federal Policy and Ignore the Practicalities of Litigation.

Applying a three year period of repose to § 10(b) actions would effectively undermine its remedial purpose to

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[36] This Court found it unpersuasive that there is overlap between §§ 10(b) and 11. Such overlap is to be expected, but this does not preclude that § 10(b) applies in numerous contexts in which § 11 cannot. *See Herman & MacLean*, 459 U.S. at 382-83. Similarly, Petitioner's argument that because there is overlap between § 10(b) and the express remedies, § 10(b) is substantively similar to the express actions is unpersuasive. There are numerous contexts in which § 10(b) applies but not the express actions. *See infra*, n.38.

[37] The theme of Petitioner's argument is that had the 73rd Congress provided for a private remedy for § 10(b), it would have enacted a one year/three year limitations period. Consequently, they focus on the legislative history behind the Acts. None of this legislative history indicates that, had Congress passed a fraud statute containing all of the elements of a § 10(b) claim, it would have applied a one year/three year limitations period. Petitioner's mode of analysis is inherently misguided. There is no indication the 73rd Congress or the SEC considered the possibility of a private right of action under § 10(b) or Rule 10b-5. *See Blue Chip Stamps*, 421 U.S. at 730, 737. There simply is no legislative intent by which to "divine" what statute of limitations Congress would have enacted. *Id. See DelCostello*, 462 U.S. at 158 n.12 ("[m]ore often . . . Congress has not given any express consideration to the problem of limitations periods."). This is precisely why this Court developed the test outlined in *DelCostello*. This Court has never tried to resolve this issue by trying to guess what Congress would have done had it provided for a limitations period. On the contrary, the presumption is that Congress intends by its silence that courts apply state law. *Agency Holding*, 483 U.S. at 147. Legislative intent is examined only to determine whether state law is consistent with the policies contained in the statute.

encourage full disclosure, prevent fraud and provide relief to defrauded persons. It would also conflict with the policy of facilitating private enforcement of the federal securities laws. Section 10(b) applies to a wide variety of ~~situ~~ations to which the express actions do not.[38] Consequently, it has become *the* most important weapon in combating securities fraud. *See supra*, Section II.B.1.

Applying a one year/three year period would prevent many defrauded investors from obtaining any relief under the federal securities laws. In many instances of fraud, such as Ponzi schemes, defaulted municipal bonds and other complex investment schemes, *see supra*, Section II.B.2., a plaintiff simply is not able to detect fraud within three years. A plaintiff's rights could be foreclosed even before fraud is discovered. A defendant need only set up a scheme that provides for some return for three years and wait for the period to expire. Applying a three year period of repose would have the effect of encouraging fraud and rewarding wrongdoers for successfully concealing their fraud. Section 10(b) would no longer function as a "catchall" antifraud mechanism, for it would not be able to deal with novel and

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[38] An action under § 10(b) "can be brought by a purchaser or seller of '*any* security' against '*any* person' who has used '*any* manipulative or deceptive device or contrivance'." *Herman & MacLean*, 459 U.S. at 382 (Court's emphasis). Because of the broad scope of these claims, there are many contexts in which the express federal actions and blue sky laws may not provide a remedy. The express terms of the statutes may provide only a limited remedy, or procedural restrictions may preclude class actions on other devices necessary when there are hundreds of defrauded investors. *See* Guin & Donaldson, *supra* note 10, at 572. Further, a § 10(b) claim can be brought against persons who manipulate securities prices, *see Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 303 (1985), the issuer of securities for false or misleading statements, *see Basic*, 485 U.S. 224, and against fiduciaries who trade in the securities market with material, non-public information, *see Dirks v. S.E.C.*, 463 U.S. 646, 653-54 (1983).

unforeseen methods of fraud.[39] Adopting a three year period of repose would reinstitute a philosophy of *caveat emptor*. Thus, it would undermine the remedial purposes of the Acts and conflict directly with the policy of encouraging private actions.

1. Congress Has Recently Indicated that Actions Involving Intentional Wrongdoing and Fraud Require a Longer Limitation Period than Three Years.

In § 20A of the Insider Trading Act, Congress provided a limitation period of "5 years after the date of the last transaction that is the subject of the violation." 15 U.S.C. § 78t-1(b)(4). This demonstrates Congress' awareness that the type of intentional wrongdoing involved in § 10(b) requires more than three years to bring an action.

The Interstate Land Sales Act, 15 U.S.C. §§ 1701 *et seq.* (1988), also demonstrates Congress' awareness that fraud often cannot be discovered within three years and requires a discovery-based limitation period that is not subject to a short

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[39] Fraud schemes are only becoming more subtle and ingenious:

> The newest twist – and the worst news for investors – is that investment frauds are claiming a wider range of victims. The cautious, conservative investor – generally immune to such things in the past – is becoming a prime target for con artists.
>
> Here's why. A decade of regulation in the securities industry has spawned crooks whose scams slither between the various laws – and remain out of the reach of regulators. In addition, financial bandits are targeting their victims with the same marketing savvy that Proctor & Gamble uses to sell soap. They're invoking God and country as they infiltrate every type of social group . . . and all financial advisory groups (including accountants & financial planners).

Schultz, Wall St. J., *supra* note 11, at p. R24, col.1.

period of repose.[40] The Interstate Land Sales Act was modeled after the Acts and has the same purpose of ensuring full disclosure and preventing fraud.[41] Section 1703(a)(2)(B-C) prohibits fraudulent practices in the land sales industry and is modeled after and virtually identical to Rule 10b-5.[42] But, unlike § 10(b) and Rule 10b-5, the Interstate Land Sales Act expressly provides for a private right of action. *See* 15 U.S.C. § 1709(a).

Congress initially provided a limitations period of "one year after the discovery of the untrue statement or the omission, or after such discovery should have been made . . . [but] [i]n no event . . . more than three years after the sale or lease. . . . " 15 U.S.C. § 1711 (1968). In 1979, Congress lengthened the limitations period to "three years after discovery of the violation or after discovery should have been made by the exercise of reasonable diligence." 15 U.S.C. § 1711(a)(2) (1988).[43] Congress lengthened the limitations

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[40] Congressional intent embodied in a statute with similar purposes is relevant. *See Capital Gains*, 375 U.S. at 186.

[41] *See United States v. Dacus*, 634 F.2d 441, 446 (9th Cir. 1980) (Interstate Land Sales Act originally "modeled on the Securities Act of 1933"); *Paquin v. Four Seasons of Tennessee, Inc.*, 519 F.2d 1105, 1109 (5th Cir. 1975), *cert. denied*, 425 U.S. 972 (1976) ("The Act closely parallels the philosophy and approach of the Securities Act of 1933. The underlying purpose of both is [to ensure full disclosure]"); *McCown v. Heidler*, 527 F.2d 204, 207 (10th Cir. 1975) (the general purpose of the Interstate Land Sales Act is "to prohibit and punish fraud" and should be construed broadly to effectuate its remedial purposes) (quoting *Capital Gains*, 375 U.S. at 195).

[42] Section 1703 is set forth in Appendix A. *See Gilbert v. Woods Marketing, Inc.*, 454 F.Supp. 745, 748 (D. Minn. 1978) (construing earlier version of § 1703(a)(2)(A-C) as "essentially similar to Rule 10b-5").

[43] At the same time, Congress amended § 1703 to more closely parallel Rule 10b-5. *See* H.R. Rep. No. 96-154, 96th Cong., 1st Sess. (1979), *reprinted in* 1979 U.S. Code Cong. & Admin. News 2317, 2350.

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period upon the realization that fraud often cannot be discovered within three years.[44] This is direct evidence of Congress' awareness that a three year period of repose is not appropriate for the type of conduct which § 10(b) addresses in light of the practical difficulty in discovering fraud. In short, in the two most recent instances where Congress has addressed fraud, it

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("The definition of a prohibited fraudulent activity is amended to conform more closely to the language found in the securities laws."). Further, Congress added prohibitions against making untrue statements or omissions in property reports or promotional material. *See* 15 U.S.C. § 1703(a)(1) (1988). Private actions for such misstatements must be brought within three years after signing the contract of sale or lease. 15 U.S.C. § 1711(a)(1). These added prohibitions are similar to §§ 11 and 12(2) of the 1933 Act. As with §§ 11 and 12(2), the relatively uncomplicated matter of identifying material misstatements or omissions in a property report is a fairly straightforward matter that can be discovered easily within three years.

[44] H.R. No. 96-154, *supra* note 43, at 2353-54:

> Statute of limitations problems have not been limited to purchasers paying installment contracts. Many purchasers buy land sight unseen, hold it for many years as an investment and never visit the property until they plan to retire. Only when they visit the property do they discover the promised roads have not been provided or maintained or the clubhouse has not been built or the land is uninhabitable because water is unavailable or the land is not suitable for septic tanks. Many such consumers have no remedy because the current statute of limitations in § 1412 [15 U.S.C. § 1711 (one year from discovery/three years from sale)] is unduly short. In fact, over 63% of the persons who complained to OILSR about land sales problems during a nine-month period in 1978 had no remedy because the statute of limitations had expired.
>
> * * *
>
> This bill would extend the statute of limitations affecting fraudulent sales . . . to three years after the discovery of the violation or after discovery should have been made by the exercise of reasonable diligence.

has chosen limitation periods that are *longer* than those provided in the express remedies of the Acts.

Congress' silence during the 45 years in which courts have implied a private right of action under § 10(b) (and applied state law) evidences Congress' acquiescence in this practice and in the expansive manner in which the courts have interpreted § 10(b).[45] In 1975, 1988 and 1990 Congress made significant amendments[46] to the Acts, yet it chose to leave intact the existing practice of borrowing state law for § 10(b). "In light of this well-established judicial interpretation, Congress' decision to leave Section 10(b) intact suggests that Congress ratified," the long-standing practice of applying state statutes of limitations. *Cf. Herman & MacLean*, 459 U.S. at 385-86; *see also Curran*, 456 U.S. at 381-82 ("the fact that a comprehensive reexamination and significant amendment of the CEA left intact the statutory provisions under which the federal courts had implied a cause of action is itself

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[45] Congress is presumed to be aware of the existing state of the law. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 379 (1982). Therefore, Congress is aware of judicial application and interpretation of § 10(b). *Cf.* H.R. Rep. No. 355, 98th Cong., 1st Sess. 3-4 (1983) *reprinted in* 3 Fed. Bar Ass'n Sec. L. Comm., *Federal Securities Law Legislative History 1933-1982*, Item 249, p. 4886-87 ("The Supreme Court has consistently construed [§ 10(b)] broadly"); *Agency Holding*, 483 U.S. at 147 (Congress is aware of the practice of borrowing state limitation periods).

[46] In 1975 Congress substantially revised the federal securities laws. *See Herman & MacLean*, 459 U.S. at 384-85 (discussing amendments of 1975). In 1988 Congress enacted the Insider Trading and Securities Fraud Enforcement Act of 1988, Pub. L. No. 100-704, 102 Stat. 4680 (codified at 15 U.S.C. § 78t-1), which added § 20A to the 1934 Act. In 1990 Congress enacted the Securities Enforcement Remedies & Penny Stock Reform Act of 1990, Pub.L. No. 101-429, 104 Stat. 931, the Market Reform Act of 1990, Pub.L. No. 101-432, 104 Stat. 963, and the Securities Acts Amendments of 1990, Pub.L. 101-550, 104 Stat. 2713.

evidence that Congress affirmatively intended to preserve that remedy").[47]

If Congress was dissatisfied with the practice of borrowing state law, it would have enacted a statute of limitations. *See Hoosier*, 383 U.S. at 704 ("when Congress has disagreed with such an interpretation of its silence, it has spoken to overturn it by enacting a uniform period of limitations"); *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 131-32 (1988) (Congress rejected the practice of borrowing state law for civil actions under the Fair Labor Standards Act by enacting a statute of limitations); *Agency Holding*, 483 U.S. at 165-66 (Scalia, J., concurring) (if "Congress knows that we will borrow state statutes of limitations unless it directs otherwise, it also knows that it has to direct otherwise if it wants us to do something else").[48] Further, in enacting § 20A, Congress specifically stated that it did not wish to restrict the rights of action implied under the securities laws and wanted to give the courts the continued freedom to develop expansively such remedies. *See* H.R. Rep. No. 910, *supra* note 12, at 27.

2. The Goal of Uniformity Is Not a Sufficient Reason to Adopt a Three Year Period of Repose.

Petitioner's argument rests, principally, on the interests of achieving national uniformity.[49] However, the goal of

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[47] *See also Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change. . . . ") (*quoted in Curran*, 456 U.S. at 382 n.66).

[48] The Clayton Act, when originally enacted, did not contain an express statute of limitation for private actions. However, Congress later deemed that one was necessary and enacted one. *See* Clayton Act, Ch. 323, § 4B, 69 Stat. 283 (1955) (current version at 15 U.S.C. § 15b (1988)).

[49] Uniformity and certainty can be achieved, as it was in *Reed*, 488 U.S. 319, *Owens*, 448 U.S. 325, and *Wilson*, 471 U.S. 261, by uniform

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uniformity is not a sufficient reason in itself to institute a three year period of repose that would effectively undermine the policies behind § 10(b) and conflict with the practicalities of litigation. *Cf. Wilson*, 471 U.S. at 275 ("the need for national uniformity 'has not been held to warrant the displacement of state statutes of limitations for civil rights actions . . . ' ") (quoting *Board of Regents v. Tomanio*, 446 U.S. 478, 489 (1980)). Respondents do not contest that uniformity and repose[50] were policy considerations when Congress enacted the Acts. But focusing on the need for repose subverts the overall orientation and purpose of the Acts – to protect and provide relief to investors:

> the interests of defendants in a securities case do not differ qualitatively from the interests of defendants sued for violations of other federal statutes such as the antitrust or civil rights laws . . . [while] the interests of plaintiffs in such suits are significant. Defrauded investors are among the very individuals Congress sought to protect in the securities laws.

Herman & MacLean, 459 U.S. at 390.

If uniformity were an overriding policy, it would "warrant selection of a federal limitations period for almost any federal statute, a conclusion plainly inconsistent with the results of our cases." *Agency Holding*, 483 U.S. at 167

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characterization of the federal remedy to a single, state law cause of action. Thus, the concern for certainty and uniformity can be met by characterizing all § 10(b) private actions as analogous to common law fraud claims. *See supra* Section II.C.1.

[50] Congress' concern for repose was necessarily secondary to and dependant upon an assumption of how long it would reasonably take a plaintiff to discover a violation and bring an action. Since Congress and the SEC never even considered a private remedy under § 10(b), one cannot assume that the 73rd Congress had any awareness of how long it should take a plaintiff to bring such a claim. *See Blue Chip Stamps*, 421 U.S. at 737.

(Scalia, J., concurring). However, the settled rule is that "Congress intends by its silence that [courts] borrow state law," *id.* at 147, which necessarily presumes uniformity is not a paramount policy consideration.[51] If Congress thought this state of affairs severely hindered a plaintiff's ability to obtain relief under § 10(b), it would have long ago instituted a uniform limitations period.[52] *See Hoosier*, 383 U.S. at 704; *McLaughlin*, 486 U.S. at 131-32; *Agency Holding*, 483 U.S. at 165-66 (Scalia, J., concurring).

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[51] This Court has never stated that courts should reject state law in the interest of uniformity. *Agency Holding* considered "the desirability of a uniform federal statute of limitations," 483 U.S. at 154, but its analysis focused on whether state law was consistent with federal policy and practicalities of litigation. Further, civil RICO presented a unique situation: (1) it was modeled expressly after the Clayton Act; (2) unlike here, there were no remotely analogous state claims; (3) civil RICO can be analogized to a much larger universe of possible claims than § 10(b); and (4) applying state limitation periods directly conflicted with federal policies.

[52] Petitioner argues the current approach undermines "the effectiveness and value of § 10(b) as a remedy" because it leads to forum shopping and uncertainty as to the applicable limitations period. Pet.'s Br. at 28. But, Petitioner's purported solution would have the effect of preventing many plaintiffs from having any remedy at all. In § 313 of the recently enacted Judicial Improvements Act of 1990 ("JIA"), Pub. L. No. 101-650, 104 Stat. 5115, Congress enacted a uniform catchall statute of limitations period of "four years after the cause of action accrues." *See* Appendix A. However, it only applies *prospectively* to actions "arising under an Act of Congress enacted after the date of the enactment of this section. . . . " *Id.* Congress chose not to apply it to § 10(b) implied actions even though it was expressly suggested. *See* Staff of Federal Courts Study Comm., 101st Cong., 2d Sess., *Providing Federal Limitations Periods for all Federal Claims*. Thus, Congress has again deemed it unnecessary to apply a uniform federal statute of limitations to § 10(b) claims. Nonetheless, should this Court decide to look to federal law, rather than state law, § 313 offers an alternative limitation period that is better suited to § 10(b) actions than the one year/three year limitation periods.

The practical result of applying a one year/three year limitations period to private § 10(b) actions would only add uncertainty and inconsistency to § 10(b) litigation.[53] Plaintiffs who do not discover fraud and fail to bring a claim within three years will be denied relief under the federal securities laws. They will be forced into a variety of state or federal courts under blue sky and/or common law remedies. Cases of national fraud would be litigated at the same time in multiple state and federal forums.[54] This will only add to the forum shopping, uncertainty and inconsistency which Petitioner seeks to remedy and would defeat the purpose of the Acts to provide a uniform, national securities law to protect investors.

IV. SHOULD THIS COURT CHOOSE TO APPLY FEDERAL LAW, THE INTERSTATE LAND SALES ACT AND THE INSIDER TRADING ACT ARE MORE ANALOGOUS THAN THE EXPRESS REMEDIES.

A. The Interstate Land Sales Act.

The private right of action under the Interstate Land Sales Act, 15 U.S.C. § 1703(a)(2), is virtually identical in purpose and language to Rule 10b-5, and its limitation period of three years from constructive discovery, 15 U.S.C. § 1711(a)(2), is consistent with the practicalities of § 10(b)

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[53] In the context of federal securities litigation, the goal of uniformity is deceptive. No matter which limitation period is adopted, uniformity will not be achieved because of the constant potential for overlap between the many express actions of the original Acts and § 10(b). If a one year/three year period were adopted, a § 10(b) violation for stock market fraud could be subject to two different statutes of limitations – a one year/three year period or the five year period under § 20A. Creative lawyers could allege the claim as an insider trader violation. Further, there is still uncertainty as to *which* one year/three year period would apply. *See supra*, Section III.A.1.

[54] *See* Sontag, *supra* p. 28, at 24 ("If his clients lose their recourse under the federal securities laws, [an attorney] will refile the claims in numerous state courts.").

litigation. *See supra*, Section III.B.1. Therefore, it is sufficiently analogous to § 10(b) and is consistent with federal policy and practicalities of litigation. However, should the Court not adopt 15 U.S.C. § 1711(a)(2), Respondents agree with the SEC that § 20A provides a more appropriate solution than a three year period of repose.

B. Section 20A.

In enacting § 20A, 15 U.S.C. § 78t-1, Congress created an express remedy for insider trading, which is encompassed by § 10(b). Section 20A allows claims for violating the securities acts "by purchasing or selling a security while in possession of material, nonpublic information." 15 U.S.C. § 78t-1(a). Such actions must be brought within "5 years after the date of the last transaction that is the subject of the violation." 15 U.S.C. § 78t-1(b)(4).

As a particular type of Rule 10b-5 violation, a plaintiff must prove the same elements as for Rule 10b-5.[55] Further, the longer limitations period of five years better accommodates the remedial policies underlying § 10(b) and the practicalities of litigation. Nevertheless, § 20A is not clearly more analogous than state law and, thus, is not a better alternative than common law fraud statutes of limitations.

Section 20A explicitly applies to only a narrow type of wrongdoing. Congress specifically stated it did not want § 20A to be construed to limit the availability of any cause of action implied under the 1934 Act, 15 U.S.C. § 78t-1(d), and "wanted to give the courts leeway to develop such implied private rights of actions in an expansive fashion . . . ", H.R. Rep. No. 910, *supra* note 12, at 27. The five year limitations

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[55] However, § 20A requires that a defendant contemporaneously bought or sold the same class of stock as did the plaintiff. 15 U.S.C. § 78t-1(a).

period applies only to actions "brought under this section." 15 U.S.C. § 78t-1(b)(4).[56] Therefore, Congress made it as clear as possible that the five year period should not apply to § 10(b) claims beyond the scope of § 20A.

Section 20A also suffers from the same problems as the other express actions. Its limitations period is not discovery-based. A claim may be barred even if a plaintiff has failed, in the exercise of reasonable diligence, to detect fraud.[57] Accordingly, § 20A, as with the other express remedies, is not broad enough to be sufficiently analogous to § 10(b) claims. It would conflict with the remedial policy of the Acts and does not accommodate the practicalities of § 10(b) litigation. Common law fraud, on the other hand, provides the closest analogy and, by applying the *Wilson* approach, would best promote federal policy and accommodate the practicalities of litigation while achieving a necessary degree of uniformity and certainty.

V. FEDERAL POLICY REQUIRES THAT ANY SECTION 10(b) STATUTE OF LIMITATIONS BE TOLLED FOR DILIGENT PLAINTIFFS WHO HAVE NOT DISCOVERED FRAUD OR WHERE DEFENDANTS HAVE ACTIVELY CONCEALED THE FRAUD.

The doctrine of equitable tolling "is read into every federal statute of limitation." *Holmberg*, 327 U.S. at 397. Federal courts uniformly toll state statutes of limitations in § 10(b) cases where reasonably diligent plaintiffs are unaware of their claims through no fault of their own, or where

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[56] *See also* H.R. Rep. No. 355, *supra* note 45, at 12 ("The limitations period [of five years] is applicable solely to actions brought under this legislation.").

[57] However, as with the other express actions, insider trading does not go long unnoticed due to the degree to which the national exchanges are watched. *See* H.R. Rep. No. 355, *supra* note 45, at 30 ("in most instances, insider trading is discovered, if at all, soon after it occurs.").

defendants have actively concealed the fraud.[58] This Court has held that fraud statutes of limitations must be tolled under these circumstances[59]:

> To hold that by concealing a fraud, or by committing a fraud in a manner that it concealed itself until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful and secure. And we see no reason why this principle should not be as applicable to suits tried on the common law side of the court's calendar as to those on the equity side.

Bailey v. Glover, 88 U.S. (21 Wall.) 342, 349 (1874).

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[58] *See, e.g., Volk v. D.A. Davidson & Co.*, 816 F.2d 1406, 1415 (9th Cir. 1987); *Cook*, 573 F.2d 685. Federal law governs when the claim accrues even where an applicable state blue sky law statute of limitations contains a statute of repose. *Hudak v. Economic Research Analysis*, 499 F.2d 996, 1000 (5th Cir. 1974) (fraudulent concealment tolls Florida blue sky statute of repose). Ever since a right of action was implied under § 10(b), Congress has acquiesced to judicial development of § 10(b) cases, including the doctrines of equitable tolling and fraudulent concealment without expressing any concern that plaintiffs' right to a remedy was being unduly promoted over defendants' interest in repose.

[59] *See Bailey v. Glover*, 88 U.S. (21 Wall.) 342 (1874); *Exploration Co. v. United States*, 247 U.S. 435 (1918); *Holmberg*, 327 U.S. 392; *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974). The doctrine of equitable tolling also applies to the Clayton Antitrust Act, the Reconstruction Era Civil Rights Acts, the Commodity Exchange Act, the Federal Tort Claims Act, the National Labor Relations Act, the Railway Labor Act, the Death on the High Seas Act, the Interstate Land Sales Full Disclosure Act, the Omnibus Crime Control and Safe Streets Act of 1968, the Age Discrimination and Employment Act, the Emergency Petroleum Allocation Act, the Occupational Safety and Health Act of 1970, the Motor Vehicle Information and Cost Savings Act, the Employee Retirement Income Security Act, the Selective Service Act, the Copyright Act, claims against the United States under the Tucker Act, suits to recover taxes and cases involving claims based on the Constitution. *See* R. L. Marcus, *Fraudulent Concealment in Federal Court: Toward a More Disparate Standard?* 71 Georgetown L.J. 801, 831-33 (1983) (and cases cited therein).

In *Holmberg*, this Court again affirmed the importance of applying the federal tolling doctrine to claims involving fraud:

> [W]here a plaintiff has been injured by fraud and "remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party." *Bailey v. Glover*, 21 Wall. 342, 348; and *see Exploration Co. v. United States*, 247 U.S. 435; *Sherwood v. Sutton*, 5 Mason 143.

327 U.S. at 397.

Most recently, the Federal Courts Study Committee concluded that even though there should be a uniform, catchall statute of limitations, the fraudulent concealment doctrine should be retained because a short statute of repose produces unfair results:

> The committee does *not* recommend abandoning the sometimes troublesome fraudulent concealment doctrine, which plaintiffs can use to argue for effective extension of the limitations period. Fairness argues against rewarding wrongdoers who succeed in concealing their misdeeds long enough, and the difficulties of making out a case of fraudulent concealment protect against widespread abuse of the doctrine.

Report of the Federal Courts Study Committee[60] ("Fed. Cts. Rpt.") (April 2, 1990) pp. 93-94. Not only is there long

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[60] In 1988, Congress created a Federal Courts Study Committee which was directed to make a complete study of the courts of the United

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established precedent for the application of the doctrines of equitable tolling and fraudulent concealment to fraud claims, but there is also recent congressional awareness of the importance of these doctrines. Therefore, these doctrines should be applied to any new statute of limitations applied to § 10(b) actions.

VI. ANY CHANGE IN THE LAW SHOULD BE APPLIED PROSPECTIVELY ONLY.[61]

In *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), this Court outlined three factors to consider to determine whether to apply a new rule of law retroactively or prospectively.

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States. Fed. Cts. Rpt. p. 31. In the Report, the Committee recommended the adoption of a catchall, uniform limitations period for all federal causes of action, express or implied, that presently lack statutes of limitations. *Id.*, p. 93. Apparently, on the basis of this recommendation, Congress enacted § 313 of the JIA which provides a limitation period of "4 years after the cause of action accrues." Pub. L. No. 101-650, 104 Stat. 5115. However, it applies only prospectively to causes of action arising under later enacted statutes. This demonstrates congressional intent that, generally, any new uniform statute of limitations should apply prospectively.

[61] Petitioner and Respondents Comdisco and Pontikes do not address this issue but apparently assume any new rule will apply retroactively. *Amicus* American Council of Life Insurance argues that any new rule should be applied to cases filed after September 22, 1987 (*Amicus* American Council's Br. at 13 n.5), based upon the date of *Agency Holding*, 483 U.S. 143. The Third Circuit categorically rejected this argument in *Gruber v. Price Waterhouse*, 911 F.2d 960, 967 (3d Cir. 1990). This would not affect this case as the original complaints were filed on November 3, 1986 in the *Gilbertson* and *Reitz* lawsuits, and on June 4, 1987, in the *Catalan* lawsuit. *Amici* Arthur Andersen, et al., take the position that the issue should first be determined by the lower courts on remand. *Amici* Arthur Andersen & Co., et al.'s Br. at 29 n.16. This would, of course, result in years of further litigation on issues such as whether plaintiffs relied on any overruled precedent. The inquiry could be different in each circuit, varying according to the established precedent and facts of the case.

First, does the new decision overrule "clear past precedent on which litigants may have relied" or decide "an issue of first impression whose resolution was not clearly foreshadowed"? *Id.* at 106-7. Second, a court must consider the "merits and demerits" of the case "by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." *Id.* (internal quotation omitted). Third, would retroactive application "produce substantial inequitable results"? *Id.* at 107. Further, courts should not indulge in the fiction that the new rule always has been the law. *Id.* Applying these factors, a new uniform statute of limitations for § 10(b) cases should only be applied prospectively.[62]

A. A New Statute of Limitations Would Establish a New Principle of Law and Overrule Clear Past Precedent in the Ninth Circuit.

In the Ninth Circuit, the long established rule has been to borrow the forum state's statute of limitations for fraud.[63] If the Court adopts a new uniform statute of limitations, it will "effectively [overturn] a long line of decisions" and clear precedent within the Ninth Circuit. *See Huson*, 404 U.S. at

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[62] This Court also has acknowledged that a new statute of limitations must allow a reasonable time after taking effect for existing causes of action to be commenced, a rule that has constitutional implications. *Wilson v. Iseminger*, 185 U.S. 55, 62 (1902); *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 681-82 (1930).

[63] *See, e.g., Volk*, 816 F.2d at 1412 (applying Montana's fraud statute of limitation); *Semegen v. Weidner*, 780 F.2d 727, 733 (9th Cir. 1985); *Admiralty Fund v. Hugh Johnson & Co.*, 677 F.2d 1301, 1308-09 (9th Cir. 1982); *Williams v. Sinclair*, 529 F.2d 1383, 1387 (9th Cir. 1975) (applying Oregon's fraud statute of limitation); *Douglass v. Glenn E. Hinton Invs., Inc.*, 440 F.2d 912, 915-16 (9th Cir. 1971) (applying Washington's fraud statute of limitation).

107. Thus, the first *Huson* factor strongly supports prospective application of a new statute of limitations.[64]

B. Retroactive Application of a New Statute of Limitations Would Neither Further nor Retard its Application.

The second *Huson* factor requires a court to weigh the merits and demerits of the case "to determine the scope of the rule and to ascertain whether [its] retroactive operation would further or retard the rule." *Gruber v. Price Waterhouse*, 911 F.2d 960, 967 (3d Cir. 1990) (refusing to apply *Data Access* rule retroactively).

This component is neutral under the circumstances of a § 10(b) case. Even though uniformity in pending litigation would be promoted by simply applying a new statute of limitation retroactively, the " 'reasoning swallows the rule.' " *Id.* at 968. All pending § 10(b) cases, notwithstanding their merits, would be subject to possible dismissal even when the plaintiffs have relied on clear precedent, or would involve

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[64] *See St. Francis College v. Al-Khazraji*, 481 U.S. 604, 608 (1987) (new statute of limitations applied prospectively because it overruled clearly established precedent on which party was entitled to rely and because retroactive application would be inconsistent with purpose of underlying statute and manifestly inequitable); *Kelly v. Burlington Northern R. Co.*, 896 F.2d 1194, 1199 (9th Cir. 1990) (either old rule applies or new rule applies and begins to run from date new rule is imposed); *Smith v. Firestone Tire and Rubber Co.*, 875 F.2d 1325, 1327 (7th Cir. 1989) (same); *Pucci v. Santi*, 711 F.Supp. 916 (N.D.Ill. 1989) (when new statute of repose is imposed, it begins to run on the date of the new rule); *see also Sohn v. Waterson*, 84 U.S. (17 Wall.) 596 (1873) (if statute imposes statute of limitations where none previously existed, it begins to run on effective date). When new statutes of repose have been applied in the medical malpractice area, courts or state legislatures have applied them prospectively only to prevent unfairness. *See Moore v. Jackson Park Hospital*, 447 N.E.2d 408, 413-14 (Ill. 1983) and cases and statutes cited therein.

extensive litigation of that issue. This Court, like the Third Circuit in *Gruber*, should be "compelled to conclude that the second factor 'does not "militate clearly either in favor of or against retroactive application" and is therefore neutral.' " *Id.* (citations omitted).

C. Retroactive Application of a New Statute of Limitations Would Produce Substantial Inequitable Results.

In this case, retroactive application of a new rule would produce substantial, inequitable results. Respondents' § 10(b) claims would not be barred but for the imposition of a new statute of limitations created more than four years after these cases were commenced. *See Huson*, 404 U.S. at 108; *Gruber*, 911 F.2d at 968; *In re Nat'l Smelting of New Jersey, Inc., Bondholders Litig.*, 722 F.Supp. 152, 160 (D.N.J. 1989). At the time these cases were commenced, the clearly established law in the Ninth Circuit was to look to the state statute of limitation for fraud. *See, e.g., Volk*, 816 F.2d 1406. It would be inequitable to conclude that plaintiffs "slept on their rights" and thus are deprived of their day in court when the rules changed after they invested and filed suit.[65]

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[65] Defendants also should not be allowed to argue that since plaintiffs did not discover their claims within three years of investing, they are not harmed by their reliance on the old rule because they would never have been able to file a timely case under a three year statute of repose. Defendants consistently had taken the opposite position. They repeatedly have argued that plaintiffs were on inquiry or actual notice of fraud quite early because the investments were not economic successes. Pet.'s Cert. Br. at 34A. Plaintiffs contend otherwise, but acknowledge that, within three years of investing, there was information the investments were economically unsuccessful although insufficient to place plaintiffs on notice of possible fraud. The Ninth Circuit agreed. Thus, defendants cannot now argue that plaintiffs could not have relied upon established Ninth Circuit precedent when they did not investigate

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CONCLUSION

Section 10(b) should not be restricted by the unduly short one year/three year statute of limitations of the express private remedies of the 1933 and 1934 Acts. Applying a three year period of repose that is not discovery-based will prevent many investors from obtaining any relief under the Acts for securities fraud. The elements and scope of § 10(b) actions, let alone their existence, go far beyond what Congress envisioned when it fashioned the one year/three year limitations period for the express remedies. The policies furthered by § 10(b) and the practicalities of litigation mandate that § 10(b) not be subject to a three year period of repose.

Common law fraud statutes of limitation provide an appropriate choice for § 10(b) actions. The similarity of their elements and purpose in addressing fraud makes those statutes sufficiently analogous to § 10(b). Uniform application of such statutes would further the remedial policies of the federal securities laws and accommodate the practicalities of litigation, while addressing concerns for uniformity and certainty.

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for fraud upon learning of the lack of success of their investments. This is something all investors will have to do if the Court adopts an absolute three year statute of repose, even though there is no indication of fraud. *Pucci* forcibly points out the distinction between a new statute of limitations and a new statute of repose in a fraud situation – a statute of limitations requires due diligence, but a statute of repose requires *extraordinary* diligence. 711 F.Supp. at 924. *Cf. Firestone Tire and Rubber Co.*, 875 F.2d at 1327 (inequity in retroactive application of *shorter* limitations period than previously applied is a factor to be considered).

For the reasons above, the Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX

SECTION 1404(a) OF THE INTERSTATE LAND SALES FULL DISCLOSURE ACT, 15 U.S.C. § 1703(a):

§ 1703. Requirements respecting sale or lease of lots

(a) Prohibited activities. It shall be unlawful for any developer or agent, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce, or of the mails –

(1) with respect to the sale or lease of any lot not exempt under section 1403 [15 U.S.C. § 1702] –

(A) to sell or lease any lot unless a statement of record with respect to such lot is in effect in accordance with section 1407 [15 U.S.C. § 1706];

(B) to sell or lease any lot unless a printed property report, meeting the requirements of section 1408 [15 U.S.C. § 1707], has been furnished to the purchaser or lessee in advance of the signing of any contract or agreement by such purchaser or lessee;

(C) to sell or lease any lot where any part of the statement of record or the property report contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein pursuant to sections 1405 through 1408 of this title [15 U.S.C. §§ 1704 through 1707] or any regulations thereunder; or

(D) to display or deliver to prospective purchasers or lessees advertising and promotional material which is inconsistent with information required to be disclosed in the property report; or

(2) with respect to the sale or lease, or offer to sell or lease, any lot not exempt under section 1403(a) [15 U.S.C. § 1702(a)] –

(A) to employ any device, scheme, or artifice to defraud;

(B) to obtain money or property by means of any untrue statement of a material fact, or any omission to state a material fact necessary in order to make the statements made (in light of the circumstances in which they were made and within the context of the overall offer and sale or lease) not misleading, with respect to any information pertinent to the lot or subdivision;

(C) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon a purchaser; or

(D) to represent that roads, sewers, water, gas, or electric service, or recreational amenities will be provided or completed by the developer without stipulating in the contract of sale or lease that such services or amenities will be provided or completed.

* * *

SECTION 1410(a), (b) OF THE INTERSTATE LAND SALES FULL DISCLOSURE ACT, 15 U.S.C. § 1709(a), (b):

§ 1709. Civil liabilities

(a) Violations; relief recoverable. A purchaser or lessee may bring an action at law or in equity against a developer or agent if the sale or lease was made in violation of section 1404(a) [15 U.S.C. § 1703(a)]. In a suit authorized by this subsection, the court may order damages, specific performance, or such other relief as the court deems fair, just, and equitable. In determining such relief the court

may take into account, but not be limited to, the following factors: the contract price of the lot or leasehold; the amount the purchaser or lessee actually paid; the cost of any improvements to the lot; the fair market value of the lot or leasehold at the time relief is determined; and the fair market value of the lot or leasehold at the time such lot was purchased or leased.

(b) Enforcement of rights by purchaser or lessee. A purchaser or lessee may bring an action at law or in equity against the seller or lessor (or successor thereof) to enforce any right under subsection (b), (c), (d), or (e) of section 1404 [15 U.S.C. § 1703(b), (c), (d), or (e)].

* * *

SECTION 1412 OF THE INTERSTATE LAND SALES FULL DISCLOSURE ACT, 15 U.S.C. § 1711(a):

§ 1711. Limitation of actions

(a) No action shall be maintained under section 1410 [15 U.S.C. § 1709] with respect to –

(1) a violation of subsection (a)(1) or (a)(2)(D) of section 1404 [15 U.S.C. § 1703(a)(1) or (a)(2)(D)] more than three years after the date of signing of the contract of sale or lease; or

(2) a violation of subsection (a)(2)(A), (a)(2)(B), or (a)(2)(C) of section 1404 [15 U.S.C. § 1703(a)(2)(A), (a)(2)(B), or (a)(2)(C)] more than three years after discovery of the violation or after discovery should have been made by the exercise of reasonable diligence.

* * *

SECTION 313 OF THE JUDICIAL IMPROVEMENTS ACT OF 1990, Pub.L. No. 101-650, 104 Stat 5115:

> Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues.